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VTL § 1104 (e)'s "Reckless Disregard" Standard is Not Applicable When the Emergency Vehicle Driver is the Plaintiff Faced with a Comparative Negligence Defense.

Saarinen v. Kerr, 620 N.Y.S.2d 297 (N.Y. 1994).
Ayers v. O'Brien, 13 N.Y.3d 456 (N.Y. 2009).

VTL § 1104 allows drivers of emergency vehicles which are in the course of responding to an emergency to violate certain traffic regulations which normally must be followed, such as obeying traffic signals, the speed limit and one-way directions. VTL § 1104 (e) dictates that a driver of an emergency vehicle is not relieved from the "duty to drive with due regard for the safety of all," and also provides that a driver is still responsible for "other consequences of reckless disregard of the safety of others."

In the 1994 *Saarinen* case, the Court of Appeals clarified that while § 1104 (e) does contain the conflicting terms "due regard" and "reckless disregard," it is the latter standard which the plaintiff must satisfy to establish an emergency vehicle driver's liability. In *Saarinen*, where a police car injured the plaintiff during a high speed chase, the Court opined that a plaintiff must show more than a driver's lack of "due care under the circumstances " (a regular negligence standard) and that the reckless disregard standard is "compelled" by § 1104(e)'s plain language. Applying the reckless disregard standard, the police officer who injured the plaintiff during the high speed chase was exonerated.

Despite the Court's clarification that the reckless disregard standard does apply when the emergency vehicle driver is the defendant, the question remained as to whether 1104 (e)'s protection also applies when the emergency vehicle driver is a plaintiff faced with a defense of contributory negligence. In other words, when the emergency vehicle driver sues for injuries sustained while pursuing an emergency and the defendant raises a defense of comparative negligence, is the defendant now required to prove that the emergency vehicle driver exhibited "reckless disregard" rather than mere negligence? Is the plaintiff emergency vehicle driver given the same protection he would receive if he were a defendant?

The Court of Appeals answered in the negative in the 2009 *Ayers* case. In *Ayers*, while a deputy sheriff was engaged in a high speed chase, the defendant's vehicle struck the sheriff's vehicle and the sheriff sued for his injuries. When the defendant raised the defense of the sheriff's contributory negligence, the sheriff claimed that pursuant to VTL § 1104 (e), the defendant would have to prove his reckless disregard in order to raise the defense. In striking down this argument, the Court reasoned that § 1104 (e)'s protection applies *only* when the emergency vehicle driver is being sued or countersued. The Court emphasized that applying the reckless disregard standard when the emergency vehicle driver is the plaintiff would create a "financial windfall" for these plaintiffs in that they could now recover even if the defendant is minimally negligent. The Court asserted that the reckless disregard standard cannot be used as a shield to ward off comparative negligence defenses; to allow otherwise would result in a "significant

unfairness" that was not intended or foreseen by the legislature when it granted emergency vehicle drivers leeway during emergencies.

The "Firefighter's Rule" Barred a Police Officer From Recovering for Injuries Sustained From a Concrete Security Barrier That Was Deemed To Be a Risk Inherent in the Officer's Duties.

Wadler v. City of New York, 2010 Slip Op. 01373 (N.Y. 2010).
Zanghi v. Niagra Frontier Transp., 626 N.Y.S.2d 23 (N.Y. 1995).
Cooper v. City of New York, 601 N.Y.S.2d 432 (N.Y. 1993).

In the 2010 *Wadler* case, the Court of Appeals barred a police officer from recovering for injuries sustained when the police car that he was driving was accidentally lifted four feet in the air by a security barrier at the police headquarters' parking lot as he was pulling in for work.

In coming to this decision, the Court relied on its 1993 *Cooper* decision, which established that police officers and firefighters are precluded from recovering in common law tort claims for injuries that result from activities associated with their employment (commonly known as the "firefighter's rule"). *Cooper* clarified that to trigger the firefighter's rule, the activity that caused the police officer or firefighter's injury must be "inherent" in his or her duties and that the determinative factor in this analysis is whether the injury sustained is "related to particular dangers which police officers are expected to assume as part of their duties, not the degree of separation between the negligent act directly causing injury" Accordingly, the Court rejected various Appellate Division decisions which held that a "separate and distinct" act which causes the officer's injury presents an exception to the firefighter's rule.

In deciding *Wadler*, the Court also referred to its 1995 *Zanghi* decision. *Zanghi* expanded upon *Cooper*'s precedent in opining that the:

> [N]ecessary connection between firefighter's or police officer's injury and special hazards associated with police and fire fighter's duties is present where performance of police officer's or firefighter's duties increased the risk of injury happening, and did not merely furnish occasion for the injury.

Put simply, where an officer or firefighter is merely present at the location where the injury occurred and not engaged in a duty specific to police officers or firefighters, the firefighter's rule does not apply, whereas the rule will apply if an act done in furtherance of a duty specific to police officers or firefighters was what created a heightened risk of injury.

In apply *Cooper* and *Zanghi* to *Wadler*, the Court found that the security enabled concrete barrier that injured the plaintiff was a risk "inherent" in his duties because police officers are often required to work in secure areas and more likely than average civilians to be exposed to highly technical security devices such as the concrete barrier. The Court found it immaterial that the officer was not on duty for another ten minutes when the accident occurred, noting that the plaintiff had applied for "line of duty" benefits.

The dissent urged that the plaintiff's injury was completely unrelated to his duties as a police officer and that the majority's decision was "wholly at odds" with existing precedent. The dissent advocated that Wadler's case was more analogous to *Olsen v. City of New York*, where a firefighter was allowed to recover for an injury he sustained when he returned to the firehouse, descended from his fire truck, and fell into a pothole; and *Delio v. City of New York*, where a police officer was not barred from recovery when a fellow officer closed a car door on his hand. In disagreeing with the majority that *Olsen* and *Delio* were "hard to reconcile," the dissent noted that the majority relied solely on distinguishable cases where the officer or firefighter was injured while on duty.

The Court of Appeals Resolves the Discrepancy Among the Appellate Divisions in Finding that Infant Plaintiff's "Horseplay" Did Not Provide a Defense of Primary Assumption of Risk in a Personal Injury Action.

Trupia v. Lake George Cent. Sch. Dist., 2010 Slip Op. 02833 (N.Y. 2010).

In *Trupia*, a twelve your old boy was severely injured when he fell on his head after sliding from a school stairwell bannister during summer school hours. After plaintiff brought suit against the School District alleging negligent supervision, the defendant moved to amend its answer to include an affirmative defense of the infant plaintiff's assumption of risk. The Supreme Court granted the defendant's motion, the Appellate Division for the Third Department reversed, and the Court of Appeals affirmed and found that the doctrine of assumption of risk did not apply to the infant plaintiff's "horseplay" because it was not a recreational or athletic activity worthy of protection.

In coming to its decision, the Court of Appeals noted that there had been previous discrepancy among the Appellate Divisions as to the application of the assumption of risk doctrine, with the First and Third Departments applying the doctrine more sparingly, and the Second and Fourth Department being broader in its application. Despite the apparent split amongst the Departments, the Court of Appeals finally limited the scope of the assumption or risk doctrine to athletic and recreational activities.

The Court based its decision on the fact that "free and vigorous" athletic and recreational activities are of "enormous social value," and thus worthy of protection under the law. The Court advocated that in order to preserve the social value and benefits of sports and recreation, those who pursue these activities are said to have assumed the heightened risk involved in them. The Court did not deem the plaintiff's horseplay of great social value worthy of protection or encouragement. In fact, the Court implied that it would be unfavorable public policy to allow children to assume the risk of their horseplay, reasoning that:

> [L]ittle would remain of an educational institution's obligation adequately to supervise children in its charge if school children could generously be deemed to have consented in advance to risks of their misconduct. Children often act impulsively or without good judgment- that is part of being a child; they do not thereby consent to assume the consequently arising dangers, and it would not be a prudent rule of law that would so broadly permit the conclusion that they had done so.

While the majority foreclosed the defense of assumption of risk in *Trupia* and like situations, it did opine that comparative negligence can apply when the plaintiff's harm is in some way attributable to his own conduct and not the defendant's. Either way, the Court asserted that New York Law has long rejected

contributory negligence as a complete bar to plaintiff's recovery and that neither comparative negligence nor assumption of risk can serve as a "renaissance of contributory negligence." Further, the Court noted that while assumption of risk and comparative negligence can and do co exist, they are distinct legal theories.

The concurring opinion by Justice Smith echoed the majority's policy arguments in finding that this case was "extremely easy" and that it would be "absurd" to find that a twelve year old boy assumes the risk that he will not be adequately supervised by his teachers. Justice Smith also advocated that while most children would happily assume a risk of non supervision, that is also the very reason that children need supervision in the first place; because they are not mature.

However, Justice Smith voiced a concern that the majority's opinion raised unanswered questions, namely what actually is an "athletic" and/or "recreational" activity, and why is bannister sliding not in either category and of less social value if the infant plaintiff was obviously doing it for fun and amusement? The concurring opinion stated that while there may very well be adequate answers for these questions, it was a "mistake" for the majority to make "sweeping pronouncements" where not needed, while simultaneously "ignoring" the questions raised by those pronouncements.

Summary Judgment for the City of New York and New York City Police Department Was Granted Where a Police Officer Who Was Injured on the Job Failed to Raise a Triable Issue Under General Municipal Law 205-e, Res Ipsa, and Common Law Negligence.

Fernandez v. City of New York, 2010 Slip Op. 50609 (N.Y. Sup. Ct. 2010).

Plaintiff was an on duty police officer who was injured when her desk drawer fell on her knee causing her to hit her shoulder on another employee's desk. Plaintiff brought suit against the City and the New York City Police Department under General Municipal Law 205-e (GML 250-e), common law negligence and res ipsa loquitur. The defendant's motion for summary judgment dismissing all claims was granted.

A. GML 205-e

While normally police officers cannot sue for injuries sustained while on duty, GML 205-creates an exception when the officer's injury result from another's negligent failure to comply with "well developed" regulations and other provisions of law that establish a "clear duty." However, notice of a statutory violation or regulation is a prerequisite to recovery.

In *Fernandez*, the plaintiff predicated her GML 205-e claim on Labor Law 27-a (commonly known as the Public Employee's Safety and Health Act or PASHA), which mandates that employer's provide employees with a place of employment that is safe and free of recognized hazards likely to cause serious physical injuries and provide reasonable and adequate protection to the health and safety of employees.

The Court rejected the defendant's argument that PASHA was an improper predicate for plaintiff's

GML 205-e claim, citing various First and Second Department decisions which held to the contrary. The Court also found that defendant's reliance on *Mastic v. Carotene*, which found that violation of an Industrial Code provision was a proper predicate for a Labor Law 241 (6) claim, was misplaced in that *Mastic* dealt with predicates for the Labor Law, not GML 205-e. The Court then rejected the defendant's argument that PASHA does not provide for a private cause of action, again citing Appellate Court decisions which held to the contrary.

Nonetheless, the Court found that plaintiff failed to raise a triable issue with respect to her GML 205-e claim because she could not establish the defendant's notice of the allegedly defective drawer being that the plaintiff herself was unaware of any previous problems or incidents with it.

As the Court wrote:

> [Where . . . a defendant could not have known of the existence of a condition which constitutes a violation of a statute or regulation concerning the safety of the premises, the requisite culpability for the applicable violation is lacking, and plaintiff has not met his burden for the recovery of statutory damages.

B. Common Law Negligence

The Court in *Fernandez* found that the "firefighter's rule" did not bar the plaintiff from suing because her injuries were not sustained from activity specific to police work, but from merely sitting at her desk. However, the Court similarly rejected plaintiff's common law negligence claim because of her failure to establish the defendant's notice of the drawer's allegedly defective condition.

C. Res Ipsa

To succeed on a cause of action for res ipsa loquitur, a plaintiff must establish that: (1) the accident is of a kind that ordinarily does not occur in the absence of another's negligence; (2) the instrumentality causing the plaintiff's accident was in the defendant's exclusive control; and (3) the accident was not due to the plaintiff's own voluntary action or contribution.

In also rejecting the plaintiff's res ipsa claim, the Court cited the First Department decision in *Pavo v. Rodin*, 679 N.Y.S.2d 27 (1st Dept. 1998). *Pavo* noted that in determining whether the defendant had exclusive control of the component that caused plaintiff's injury as required by res ipsa, the key inquiry is whether the component itself was generally handled by the public. While *Pavo* allowed the plaintiff to proceed with a res ipsa claim because the defective door hinge that allegedly injured the plaintiff could not be easily reached by the public, the Court in *Fernandez* found the facts before it distinguishable because the plaintiff's desk drawer was not only easily accessible by others, but within her primary control. The Court also noted that the plaintiff failed to establish a prima facie res ipsa claim because a desk drawer can cause injuries even if used normally and without negligence.

Because the plaintiff failed to establish a triable issue of fact with respect to all three of her causes of action, the Court in *Fernandez* granted the defendant's motion for summary judgment.